UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	
Gary M. Wasson, Respondent.	HUDALJ No. 04-030-DB OGC Docket No. 03-3081-DB

HEARING OFFICER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

This proceeding arose pursuant to 24 C.F.R. §24.100 *et seq.* as a result of action taken by the Director, Departmental Enforcement Center, U.S. Department of Housing and Urban Development ("the Department" or "HUD" or "the Government"). On May 20, 2003, the Director notified Gary M. Wasson ("Respondent") that the Department proposed to debar him from future participation in procurement and nonprocurement transactions as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government for a period of two years.

The notice of May 20, 2003, alleged that Respondent had engaged in seriously irresponsible conduct while he was Director of Operations of the Housing Authority of the City of Evansville, Indiana ("EHA"). According to the notice, while Respondent was in that position in 1997, the housing authority, in violation of contracts with HUD, used HOPE I grant funds to purchase an administration building and then renovated the building with Comprehensive Grant funds.

Respondent opposed the Department's proposal and requested a hearing. After an informal hearing on November 19, 2003, the case was referred to the Office of Administrative Law Judges on December 13, 2003, for "findings on all material facts in dispute concerning debarment related issues." Pursuant to agreements reached with counsel for the parties during a telephone conference call on December 18, 2003, the case was set down for hearing on April 13, 2004.

On March 29, 2004, the hearing was continued without date based on a request by the parties to resolve their dispute on motion without an oral hearing. Both parties

thereafter filed motions that asserted that they had no dispute as to material facts. When I pointed out in a telephone conference that I would have no mandate if no material facts were in dispute, the parties agreed to seek an expansion of the mandate from the debarring official. They did so, and on June 8, 2004, the debarring official amended the mandate "to include findings of material facts and conclusions of law concerning debarment related issues." During a subsequent telephone conference, the parties were given an opportunity to file additional pleadings in light of the expanded mandate. They declined the opportunity, and the matter is now ripe for decision. These findings and conclusions have not been issued within the period contemplated by the regulations because of the press of other business and because a significant part of the decision in draft form was lost through computer malfunction and had to be recreated.

FINDINGS OF FACT

1. From September 1999 until the present, Respondent has been the Deputy Executive Director of the Rochester, New York, public housing authority. (Wasson Deposition of March 5, 2004 ("Wasson Deposition"))

2. Respondent was employed by EHA between July 1995 and September 1999. He was EHA's Director of Finance from July 1995 until March 1996, when he was promoted to Director of Operations. As Director of Operations, Respondent was responsible for the day-to-day operations of the housing authority and for supervision of EHA staff. (Respondent's declaration of September 10, 2003 ("Wasson Declaration"); Declaration of John W. Collier of September 10, 2003 ("Collier Declaration"))

3. From May 1994 to June 1995, Respondent was Director of Finance of the Housing Authority of the City of Austin, Texas. (Wasson Deposition)

4. From June 1988 to May 1994, Respondent was Director of Finance and Assistant Executive Director of the Housing Authority of the City of Pasco, Washington. (Wasson Deposition)

5. From May 1984 to May 1988, Respondent was Chief Accountant for the Housing Authority of the City of Sunnyside, Washington. (Wasson Deposition)

6. John W. Collier was the Executive Director of EHA from July 1991 until February 2001, when he resigned. (Collier Declaration)

Use of HOPE I Grant Program Funds to Purchase New Administration Building

7. In October 1993, EHA applied to HUD for a grant of $348,381 under HUD's HOPE I program. The primary purpose of the grant was to help EHA provide home ownership opportunities to 15 low-income residents of Evansville. HUD awarded the grant application, and the parties entered into a grant agreement in October 1994. (Collier Declaration; Exhibit 7, Government's Brief of August 20, 2003)

8. Mr. Collier was primarily and ultimately responsible for administration of the HOPE I grant. Whereas Mr. Kenneth Colbert, EHA's Director of Human Resources, had some responsibilities in connection with it, responsibility for implementing the grant fell on Respect, Inc., a not-for-profit corporation affiliated with EHA. (Wasson Declaration; Collier Declaration)

9. While serving as Director of Finance at EHA, Respondent's sole responsibility in connection with the HOPE I grant was to develop accounting and recordkeeping practices for the grant. (Wasson Declaration; Respondent's Answers to Interrogatories 6 and 8)

10. All 15 of the home sales covered by the HOPE I grant agreement were completed by December 29, 1995. The sales proceeds were placed in an interest-earning bank account and were not used for more than a year. (Exhibit 7, Government's Brief of August 20, 2003)

11. In 1996, EHA's Board of Commissioners approved a plan to expand EHA's administration building using $300,000 in Comprehensive Grant Program ("CGP") funds received from HUD. (Wasson Deposition, pp. 132-33; Wasson Declaration; Memorandum dated February 18, 1999, from EHA's Board of Commissioners to HUD's Indiana office, p. 7)

12. During an early stage of the expansion project, Respondent became aware of a building for sale on Court Street in Evansville that was large enough to house all of EHA's then separated administrative, warehouse, and maintenance functions. (Wasson Declaration)

13. After Respondent informed Mr. Collier about the building, Mr. Collier and EHA's Board chairman visited the property and agreed that it would meet EHA's needs, improve EHA's delivery of services, and save administrative costs. (Wasson Declaration; Collier Declaration; EHA response of February 18, 1999, to HUD inquiry)

14. The asking price for the Court Street building was $1,100,000. However, after the building was appraised for a considerably lower amount, the owner agreed to accept $750,000. (Letter dated January 27, 1997, from Mr. Collier to HUD's Director of Public

Housing for Indiana; EHA's response of February 18, 1999, to HUD inquiry; Letter dated December 15, 1997, from Respondent to Ms. Anita Cook in HUD's Indiana office)[1]

15. Mr. Collier then directed Respondent to look into financing options for EHA's possible purchase of the Court Street building. (Wasson Deposition at pp. 58-59)

16. Respondent presented Mr. Collier with three options for financing EHA's purchase of the Court Street building: (1) borrow the purchase price from a private lender with a traditional mortgage on the building; (2) borrow the purchase price from a private lender with a mortgage secured by other EHA assets; and (3) purchase the building with part of the approximately $900,000 in the HOPE I account. (Wasson Declaration; Collier Declaration)

17. When Respondent presented Mr. Collier with these options for financing EHA's purchase of the Court Street building, Respondent had neither seen the HOPE I grant agreement nor knew its terms. (Respondent's Answer to Interrogatory No. 12)

18. After Mr. Collier decided that the best option for EHA was to purchase the Court Street building with HOPE I sales proceeds, he successfully urged the Board of Commissioners to authorize the transaction. During a board meeting on December 4, 1996, Mr. Collier explained that the building could be purchased with money that was

> previously ear marked [*sic*] to purchase, build or rehab properties to sell to public housing residents. The money could be used to purchase the new office building and the money would do double the duty for the agency. The equity in the building could be borrowed against at any time, property bought and sold to EHA residents then paid back.

---

[1]It is unclear how many times the property was appraised and for how much. One document in the record indicates that it was appraised for $1,000,000, another for $775,000, and another for $750,000. (Letter dated January 27, 1997, from Mr. Collier to HUD's Director of Public Housing for Indiana; EHA's response of February 18, 1999, to HUD inquiry; Letter dated December 15, 1997, from Respondent to Ms. Anita Cook in HUD's Indiana office)

(Wasson Declaration; Collier Declaration; Minutes, EHA Board of Commissioners Special Call Meeting, December 4, 1996)

19. Mr. Collier did not rely upon Respondent's recommendation when he decided that EHA should buy the Court Street building with funds in the HOPE I account. (Collier Declaration)

20. Respondent did not attend the meeting when the board approved purchase of the Court Street building. EHA's general counsel and a staff attorney, however, did attend the meeting. The record does not show that either attorney questioned the propriety of using HOPE I proceeds to purchase a new administration building. (Minutes, EHA Board of Commissioners Special Call Meeting, December 4, 1996)

21. Respondent obtained a commitment from a local bank to provide EHA with a line of credit of up to 75 percent of the appraised value of the Court Street building. (Wasson Declaration)

22. When Mr. Collier sought authorization from the Board of Commissioners for purchase of the Court Street building using HOPE I sales proceeds, he believed that the HOPE I grant agreement permitted use of the funds for that purpose without prior permission from HUD. Mr. Collier believed that purchase of the building was a sound investment with funds that had lain dormant for nearly a year and that the line of credit that had been arranged would ensure that whatever funds were needed in the future for EHA's home ownership program would be available. (Collier Declaration)

23. On January 3, 1997, EHA used $750,000 from its HOPE I fund account to buy the Court Street building to house its administrative, maintenance, and warehouse facilities. (Exhibits 11 and 12 to Government's Brief dated August 20, 2003)

24. In April 1997, the HOPE I program was closed out. (Government's Brief, August 20, 2003)

25. Following the purchase of the Court Street building and the close-out of the HOPE I program, EHA continued to operate a home ownership program and created a full-time position dedicated to it. EHA sold 18 homes through that program between 1997 and 2001. (Wasson Declaration; Collier Declaration; Letter from HUD's Director of Public Housing for Indiana to Mr. Collier dated January 15, 1998; Letter from Michael Bean to Michael Scanlin dated August 13, 2002)

Use of Comprehensive Grant Program ("CGP") Funds
to Renovate New Administration Building

26. In December 1996 and January 1997, Respondent participated in discussions with Mr. Collier and other EHA staff members leading to a decision to reprogram approximately $161,000 out of $300,000 in CGP funds that the Board of Commissioners had previously authorized for expansion of the old administration building and instead use those funds to pay for renovations to the Court Street building. (Wasson Declaration; Respondent's Answer to Interrogatory No. 24; Wasson Deposition at pp. 128-31)

27. Respondent, Mr. Collier, and other EHA staff members believed that using CGP funds to renovate the Court Street building was a permissible reduction and reprogramming to a related use of funds in an existing line item in EHA's budget. They also believed that this reallocation of funds did not require a separate budget amendment or specific HUD approval. (Wasson Declaration; Collier Declaration; Wasson Deposition at pp. 130-31)

28. The comprehensive plans, five-year plans, and annual reports that EHA submitted to HUD before 1997 in support of the housing authority's requests for CGP funds did not indicate EHA's intention to use CGP funds to expand the housing authority's old administration building or renovate the new building on Court Street. (Jones Declaration of March 23, 2004)

29. On September 29, 1997, Respondent signed, on behalf of Mr. Collier, an Annual Statement and Performance Evaluation Report of Replacement Reserve Comprehensive Grant Program, which was submitted to HUD. That Annual Statement indicated that EHA had spent $164,283 to renovate EHA's old administration building. Those funds had in fact been used to renovate the EHA's new administration building on Court Street. (Exhibit 13, Wasson Deposition; Jones Declaration of March 23, 2004)

Communications with HUD Regarding Purchase and
Renovation of the Court Street Building

30. No one from EHA sought HUD's approval before EHA used HOPE I funds to purchase the Court Street building. (Jones Declaration of September 16, 2003)

31. In January 1997, Respondent received a telephone call from Ms. Anita Cook, a Public Housing Revitalization Specialist in HUD's Indiana office, inquiring about EHA's purchase of the Court Street building. By letter dated January 27, 1997, addressed to Mr. Forrest Jones, HUD's Director of Public Housing for Indiana, Mr. Collier explained in

considerable detail EHA's purchase of the building using funds from the HOPE I account. (Letter from Mr. Collier to Mr. Jones dated January 27, 1997)

32. During subsequent telephone conversations with Ms. Cook and Ms. Catherine Lambert, another HUD representative, Respondent asked whether HUD considered EHA's purchase of the Court Street building improper and whether corrective action should be taken. He received no further guidance. (Respondent's Answer to Interrogatory No. 18)

33. By letter dated December 15, 1997, addressed to Ms. Cook, Respondent again explained EHA's purchase of the Court Street building using funds from the HOPE I account. (*Op. cit.*)

34. EHA's Board of Commissioners reaffirmed its approval of the Court Street building transaction on February 18, 1999, in response to questions posed by HUD's Indiana office.

> **Question A:** Were proper approvals and authorizations obtained in advance of the purchase of the building?
>
> **Answer:** The Board properly adopted Resolution 96-12-01 authorizing the purchase of the 500 Court Street EHA building. . . . No further approvals or authorizations were required. [Citation to evidence that was not included in the record has been omitted.; EHA Response to HUD's Request for Review and Response dated February 18, 1999, attached as exhibit 9 to Respondent Gary Wasson's Motion for Summary Judgment dated March 16, 2004]

35. No one from EHA sought HUD's approval before EHA used CGP funds in 1997 to renovate the Court Street building. (Jones Declaration of March 23, 2004)

36. In early 1999, HUD's Indiana office posed a series of questions to EHA's Board of Commissioners regarding the renovation of the Court Street building. On February 18, 1999, the Board replied to one of the questions as follows:

> **Question E:** Were any HUD program funds used for the renovation of the building; how much and from what source; were proper approvals and authorizations obtained in advance; what was the basis for the scope of work on the renovation?
>
> **Answer:** HUD program funds were used for the renovation of the building. As set forth in a letter to Anita Cook, HUD, from Gary

> Wasson, dated 4/17/98, $154,908 was spent from Comprehensive Grant Funds, Replacement Reserves to build the interior offices and other improvements to ready the building for the EHA's occupancy. . . . No approval was needed for the expenditure of these funds. HUD was sent a Revised Budget in June 1998 with the expenditures addressed.
>
> The basis of the scope of work on the renovation was to build the interior offices and other improvements to ready the building and make it suitable to the EHA's needs, in both providing resident services and employee-related office services to better address these resident/client needs. [Citation to evidence that was not included in the record has been omitted; EHA Response to HUD's Request for Review and Response dated February 18, 1999, attached as exhibit 9 to Respondent Gary Wasson's Motion for Summary Judgment dated March 16, 2004.]

37. Mr. Jones and his staff conducted a management review of EHA that was completed in late May or early June of 1999. That review included examination of EHA's purchase and renovation of the Court Street building. At no time during that review did Mr. Jones or any member of his staff indicate to Respondent or to Mr. Collier that HUD considered anything about the transactions improper. (Respondent's Answer to Interrogatory No. 19)

38. Mr. Jones issued a report of the management review in September 1999. That report gave EHA high marks for its financial management and concluded:

> The overall outcome of the reviews included here was highly positive and, as you will see in the review reports enclosed, the EHA is doing a fine job in providing needed housing and valuable services to its residents. You and your Board are to be commended.

The report contained no complaint about EHA's purchase of the Court Street building with funds from the HOPE I account and renovation of the building with CGP funds. (Letter from Mr. Jones to Mr. Collier dated September 30, 1999)[2]

[2]According to an article in the *Evansville Courier & Press* published on May 30, 1999, HUD's review of EHA operations was prompted by allegations made more than a year earlier that Mr. Collier had, among other things, misused funds and made racial slurs. The article reported that EHA's board of directors also had investigated the allegations and sent a report to HUD that concluded that the allegations were not true and that the

> "board believes the allegations to be part of a misguided effort by an individual with a personal vendetta against the executive director, and by several former EHA employees disgruntled as a result of their termination or disciplinary action by the EHA . . . ."

HUD's Investigation and Subsequent Proposed Debarments

39. Prompted by an anonymous complaint, HUD's Office of Inspector General investigated EHA's operations in 2000-2001. (Government's Brief dated March 23, 2004, in Support of Its Cross Motion for Findings of Fact and Its Opposition to Respondent's

---

Although HUD's investigation of EHA was incomplete as of May 30, 1999, the newspaper quoted Mr. Jones as follows:

> "John [Collier] has gone to great lengths to establish an agency that functions at a high level. And over and above that, largely on his own, he has done innovative activities with the residents . . . and has built relationships and partnerships with other community agencies," said Forrest D. Jones, coordinator of HUD's public housing program center for Indiana.
>
> Jones said Collier is sought out by national housing organizations and by HUD to conduct seminars on how to do the things he's done. [Newspaper article attached to Respondent's Brief in Opposition to Debarment dated September 10, 2003]

Motion for Summary Judgment at n.5.)

40. On May 20, 2003, more than three and a half years after Respondent left EHA's employ, HUD issued a notice to Respondent proposing to debar him from future participation in procurement and nonprocurement transactions as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government for a period of two years based on his involvement in the purchase and renovation of the Court Street building. (*Op. cit.*)

41. On May 20, 2003, HUD also issued a notice to Mr. Collier proposing to debar him for three years. Mr. Collier states that "[b]ecause I cannot afford the cost of defending myself in those proceedings, I have opted not to take action to oppose my debarment." (Collier Declaration)

SUBSIDIARY FINDINGS AND DISCUSSION

The purpose of debarment is to protect the public interest by precluding persons who are not "responsible" from conducting business with the federal government. 24 C.F.R. §24.115(a). *See also Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. *See* 24 C.F.R. §24.115.

In the context of debarment proceedings, "responsibility" is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. *See* 24 C.F.R. §24.305. *See also Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. *See Shane Meat Col., Inc. v. U.S. Dep't of Defense,* 800 F.2d 334, 338 (3rd Cir. 1986). That assessment may be based on past acts. *See Agan*, 576 F. Supp. 257; *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense,* 726 F. Supp. 278 (D. Colo. 1989).

Jurisdiction

HUD's debarment regulations

> [a]pply to all persons who have participated, are currently

participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes

of these regulations such transactions will be referred to as *covered transactions.* [24 C.F.R. §24.110(a)]

Section 24.105 of 24 C.F.R. defines a "participant" as

> [a]ny person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

The parties apparently agree that EHA is a principal, but Respondent argues that he is not a participant. That argument has no merit. On November 26, 1997, with authority from EHA, Respondent signed a contract on behalf of EHA promising to pay $467,800 to a contractor in exchange for demolition work. The funds to pay the contractor came from EHA's Comprehensive Grant Program Replacement Reserves, which were acquired in a primary covered transaction as defined by 24 C.F.R. §110(a). In the words of 24 C.F.R. §110(a)(1)(ii)(B), the demolition contract was a

> procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

Because Respondent committed a participant in a procurement contract to pay for services valued at more than $25,000, he is a participant and subject to HUD's debarment regulations.

Cause for Debarment

HUD rests its case for debarring Respondent on the following allegations of fact: He recommended to the EHA Board of Commissioners that EHA use HOPE I sales proceeds to buy the building, negotiated the price of the Court Street building with the owner, participated in discussions among EHA staff members regarding use of CGP funds to renovate the Court Street building, supervised the EHA department that used CGP funds for that purpose, and signed a report to HUD showing EHA had spent CGP funds renovating EHA's old administration building that had actually been spent renovating the Court Street building.

The preponderance of the evidence of record supports only part of the Department's factual allegations. Although Respondent admits that he had identified HOPE I funds to Mr. Collier as a suitable funding source for purchase of the Court Street building, he denies that he urged the EHA board to authorize use of HOPE I funds for that purpose. (Respondent Declaration) His denial is credible. His assertion that he had no conversations with board members regarding the transaction was not refuted, and minutes of the board meeting when the transaction was authorized show that Respondent was not present when the board endorsed Mr. Collier's proposal to buy the Court Street property with HOPE I funds. Mr. Collier states that he did not rely upon Respondent's recommendation when he made that proposal.

Respondent denies that he negotiated the purchase price of the building, a denial that the Government has not disproved. (Respondent Declaration) Respondent does not deny that he participated in discussions among EHA staff members regarding use of CGP funds to renovate the Court Street building, that he supervised the EHA department that used CGP funds for that purpose, and that he signed an erroneous report to HUD. Does Respondent's conduct constitute cause for debarment?

Purchase of the Court Street Building with HOPE I Funds

Article X of the HOPE I implementation grant agreement provides in part:

> 1. Use of sales proceeds. The Grantee (or other entity specified in the approved application) shall use the proceeds, if any, from the initial sale of units to eligible families for the costs of the homeownership program, including operating expenses, improvements to the project, business opportunities for low-income families, supportive services related to the homeownership program, additional homeownership opportunities, and other activities approved by HUD, either as part of the approved application, or as subsequently approved by HUD. The use of sales proceeds under this Article X(1) shall be governed by the requirements of section 725 of the HOPE I Guidelines, as that section may from time to time be amended.

HUD's letter of proposed debarment (which functions as the Government's complaint) states that when EHA bought the Court Street building with HOPE I proceeds, the housing authority violated the grant implementation agreement

because "under the Agreement, HOPE I grant funds can only be used for the promotion of residential home ownership and not to purchase property to be used as an administration building." This statement is incorrect for several reasons: (1) Article X(1) does not explicitly state that sales proceeds cannot be used to purchase an administration building; (2) Article X(1) does not state that sales proceeds can be used *only* "for the promotion of home ownership"; (3) On the contrary, Article X(1) states that sales proceeds may be used for other purposes, such as "business opportunities for low-income families"; (4) Article X(1) also authorizes use of sales proceeds for "supportive services related to the homeownership program," which an administration building unarguably provides (as well as other services); and (5) Article X(1) explicitly states that sales proceeds may be used for "other activities approved by HUD, either as part of the approved application, or as subsequently approved by HUD." Moreover, the HOPE I guidelines authorize the Secretary to waive any provision governing grant funds except deadlines. *See* 57 F.R.1522 (January 14, 1992) at section 901.[3]

According to both Respondent and Mr. Collier, the HUD official with approval authority, Mr. Forrest Jones, orally approved EHA's purchase of the building with HOPE I sales proceeds in the presence of several witnesses in late May or early June 1999, during a meeting held in Mr. Collier's office upon completion of a review of EHA's operations by Mr. Jones and his staff. Respondent also asserts that Mr. Jones promised during the same meeting to confirm his approval in writing but never did. (Respondent's Answer to Interrogatory No. 19, March 4, 2004) Mr. Jones denies that he approved the transaction. (Jones Declaration of September 16, 2003)

Assuming (without deciding) that Mr. Jones' denial is not creditable, would

---

[3]I note that in 1994 the Secretary waived a contractual provision under HUD's Turnkey III Homeownership program that required a housing authority to use home-sale proceeds only to provide housing for low-income people. In that case, the Secretary authorized the housing authority in Lubbock, Texas, to use home-sale proceeds to buy a multi-purpose building that would contain the housing authority's administrative offices. *See* Audit Report, Office of Inspector General, dated October 24, 1997, accessible on HUD's website.

his approval of the transaction satisfy EHA's duty under Article X(1)? The answer requires interpretation of the ambiguous phrase "as subsequently approved by HUD" in Article X(1). The phrase could be interpreted to mean that HUD's approval can be acquired by a grantee either before or after the expenditure of the sales proceeds. In either case, approval would come after the date of the agreement, and that is all that is unambiguously required by that phrase. If the claims that Mr. Jones gave EHA his approval are true, and if Article X(1) were interpreted to permit *ex post facto* approval of the transaction, then HUD's case for debarment against anyone based on that transaction would collapse.

However, Article X(1) of the HOPE I implementation agreement cannot be reasonably interpreted to mean that HUD's approval can be lawfully acquired by a grantee after sales proceeds have already been spent. HOPE I grants are invested with the public interest, and HUD has a fiduciary duty to ensure that public funds are spent both wisely and lawfully. HUD cannot properly fulfill its duty to guard the public fisc when a grantee requests approval of a *fait accompli*. It is therefore unnecessary to decide whether Mr. Jones orally approved the transaction after the fact. Because Article X(1) of the HOPE I grant implementation agreement does not unambiguously authorize use of HOPE I home-sale proceeds to buy an administration building, I conclude that EHA could not lawfully use the funds for that purpose without first obtaining HUD's approval. The failure to do so violated the agreement.

The Government argues that EHA's violative purchase of the Court Street building can be imputed to Respondent under 24 C.F.R. §24.325(b)(2), which provides:

> (2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

However, the imputation section of the regulations does not apply in this case because EHA's failure to get HUD approval before purchasing the Court Street building was not fraudulent or criminal, or so seriously improper as to be tantamount to a fraud or crime. The doctrine of *ejusdem generis* holds that when interpreting a list of items in a series in a statute or regulation, specific language controls general language. *Brogan v. United States,* 522 U.S. 398, 404 n.2 (1997); *United States v. Security Mgmt. Co.,* 96 F.3d 260, 265 (7th Cir. 1996), *reh'g denied,* 1996 U.S. App. LEXIS 27638 (7th Cir. 1996); *Red Ball Leasing, Inc. v. The Hartford Accident and Indemnity Co.,* 915 F.2d 306, 312 (7th Cir. 1990); *see also, In the Matter of Edward Blake,* 1991 HUD BCA LEXIS 26 at *29 (doctrine of *ejusdem generis* controlled interpretation of a previous version of 24 C.F.R. §24.305(d)). When applied to 24 C.F.R. §24.325(b)(2), the doctrine precludes use of the phrase "other seriously improper conduct" (general language) to sweep conduct that is not as seriously improper as "fraudulent" or "criminal" conduct (specific language) within the reach of the regulation. The record does not show that any of the persons responsible for EHA's decision to purchase the Court Street building made that decision in bad faith, knew that the transaction was unlawful, tried to keep HUD from discovering it, or intended to

deceive anyone. In sum, because EHA's violation in this case clearly does not

come close to the seriousness of a fraud or a crime, the violation cannot be imputed to Respondent as a matter of law.

Furthermore, Respondent was not responsible for the violation as a matter of fact. He did not decide to buy the building with HOPE I funds; Mr. Collier and members of the EHA board made that decision (with the apparent acquiescence of EHA's attorneys). He did not decide that EHA could purchase the building without HUD's prior approval; Mr. Collier independently made that decision based on his own knowledge of the grant agreement terms. Respondent's involvement in the transaction was limited to bringing the Court Street building to Mr. Collier's attention and identifying the HOPE I account as one of three potential sources of funds to buy the building. Pointing out that a building is for sale cannot possibly constitute cause for debarment. Therefore, as far as the purchase transaction is concerned, only one ground remains as a possible cause for Respondent's debarment: without investigating to determine whether he was right, Respondent identified the HOPE I account as a suitable funding source for purchase of the Court Street building. In short, he gave his superior defective financial advice, albeit advice that was not relied upon. When Respondent gave Mr. Collier bad advice, did he also create cause for his debarment?

Section 24.305 of 24 C.F.R. lists the causes for which debarment may be imposed. The Government argues that Respondent's conduct falls within subsections (b), (d), and (f) of that section. Subsection (b) reads as follows:

> Violation of the terms of a public agreement or transaction so serious as to affect the integrity of any agency program, such as:
> (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
> (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
> (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

As shown above, Respondent was not responsible for EHA's violation of the HOPE I grant implementation agreement. Respondent gave Mr. Collier bad advice; but the Government has not cited the terms of any public agreement, transaction, statute, regulation, or requirement applicable to a public agreement or transaction that prohibit an employee of a public housing authority from giving his supervisor bad advice. Respondent has no "history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions."

Therefore, when Respondent failed to investigate whether his financial advice was sound, he did not generate cause for debarment under 24 C.F.R. §24.305(b).

Subsection 24 C.F.R. §24.305(f) provides:

> In addition to the causes set forth above, HUD may debar a person from participating in any programs or activities of the Department for material violation of a statutory or regulatory provision or program requirement applicable to a public agreement or transaction including applications for grants, financial assistance, insurance or guarantees, or to the performance of requirements under a grant, assistance award or conditional or final commitment to insure or guarantee.

Again, the Government has not shown that Respondent's bad advice to Mr. Collier, viewed in isolation, violated any "statutory or regulatory provision or program requirement." Cause for debarring Respondent based on the building purchase therefore cannot be found in 24 C.F.R. §24.305(f) either.

Among the listed causes for debarment, 24 C.F.R. §24.305 includes a catch-all provision at subsection (d): "Any other cause of so serious or compelling a nature that it affects the present responsibility of a person." Respondent gave his superior bad advice, but he states that he did not know when he gave that advice that the HOPE I implementation agreement prevented use of home-sale proceeds to buy an administration building without HUD's permission. That statement is credible. He did not come to work for EHA until long after the HOPE I grant agreement had been negotiated, and his duties would not have caused him to become familiar with the terms of the agreement. However, Respondent's ignorance of the terms of the agreement is no excuse. Anyone with Respondent's years of experience working with public money while employed by public housing authorities has ample reason to know that grants of public funds come with many conditions and restrictions attached. Respondent acted irresponsibly when he identified HOPE I funds as a suitable financing source without first investigating those conditions and restrictions to determine whether he was right. Although it is a close question, I conclude that Respondent's irresponsible advice was, in the words of 24 C.F.R. §24.305(d), "of so serious or compelling a nature that it affects the present responsibility of a person." In other words, when Respondent advised Mr. Collier that the Court Street building could be purchased with HOPE I funds, he affected his "present responsibility," and therefore created cause for debarment.

Renovation of Court Street Building with CGP Funds
and Submission of Erroneous Report to HUD

Section 968.112 of 24 C.F.R. lists those costs for which a public housing authority may use CGP funds. Subsection (c) of that section states in part that "[t]he Field Office has the authority to approve nondwelling space where such space is needed to administer, and is of direct benefit to, the public housing program."

Part 968 of 24 C.F.R. requires public housing authorities receiving CGP funds to submit comprehensive plans, five-year plans, and annual reports to HUD. The documents that EHA submitted to HUD before 1997 in support of its requests for CGP funds neither indicated an intention, nor requested authority, to use CGP funds to expand EHA's old administration building or to renovate the new building on Court Street.

HUD's complaint of May 20, 2003, does not address this evidence. The complaint instead alleges:

> The EHA also violated the Annual Contributions Contract ("ACC") entered into between EHA and HUD when it spent $161,283 in Comprehensive Grant funds for the purpose of rehabilitating the Court Street building. Such use of Comprehensive Grant Funds violated 24 C.F.R. §968.125 because the Court Street building was not a property covered under the ACC.

Because the Government did not enter the ACC into the record, the evidence does not support the allegations of the complaint. Moreover, 24 C.F.R. §968.125 does not address any of the issues raised by this case. That provision regulates the timing of expenditures and activities engaged in by a public housing authority pursuant to a housing modernization program using CGP funds previously approved by HUD.

Notwithstanding the allegations of the complaint, the Government argues on brief that Respondent's involvement in EHA's use of CGP funds to renovate the Court Street building violated 24 C.F.R. §§968.315 and 968.320(c).[4] Section

[4]Because Respondent has had ample opportunity to respond to the Government's arguments on brief, he has suffered no prejudice as a result of the differences between the allegations in the complaint and the allegations in the Government's briefs.

968.315(e) of 24 C.F.R. prescribes the contents of a public housing authority's comprehensive plan and states in part:

> The comprehensive plan shall identify all of the physical and management improvements needed for a PHA and all of its developments, and that represent needs eligible for funding under §968.112.

Section 968.320(c) of 24 C.F.R. provides that "[a]ctual uses of the [CGP] funds are to be reflected in the PHA Annual Performance and Evaluation Report for each grant." Comprehensive plans and annual statements are considered approved by HUD unless HUD notifies the public housing authority in writing, within 75 calendar days after receipt, that HUD has disapproved the plan. 24 C.F.R. §§968.320(a)(3) and 968.325(g).
An approved comprehensive plan is binding on both HUD and the public housing authority. 24 C.F.R. §968.320(c).

EHA used CGP funds to renovate the Court Street building without HUD's prior permission and submitted a report stating that $161,283 in CGP funds had been spent renovating EHA's old administration building, whereas the money had actually been spent renovating the new administration building on Court Street. EHA's failure to identify and secure approval for either an expansion of the old administration building or renovation of the Court Street building violated 24 C.F.R. §968.315, and the erroneous report to HUD violated 24 C.F.R. §968.320(c).

HUD argues that EHA's conduct regarding the CGP funds must be imputed to Respondent under 24 C.F.R. §24.325. For the same reasons set out in the above discussion regarding EHA's purchase of the Court Street building, HUD's argument has no merit. EHA's misconduct regarding the CGP funds is not commensurate with a fraud or a crime and hence cannot be imputed to Respondent. Nevertheless, Respondent's involvement in the misconduct created cause for debarment.

Respondent participated in discussions with Mr. Collier and other EHA staff members in December 1996 and January 1997 leading to a decision to reprogram approximately $161,000 out of $300,000 in CGP funds that EHA's Board of Commissioners had previously authorized for expansion of the old administration building and instead use those funds to renovate the Court Street building. Respondent did not object to that decision and agreed with it. (Wasson Deposition, p. 131)

HUD had not authorized EHA to use CGP funds to create administrative offices of any sort. Therefore, the authorization by the Board of Commissioners to use CGP funds to expand the old administration building was unlawful. It was unlawful as well for Respondent and other EHA staff members to reprogram part of the funds slated for office expansion and instead use them to create office space in a new administration building. In other words, the renovation of the Court Street building cannot be justified as a simple reprogramming of an existing line item in EHA's budget.

As indicated above, EHA's failure to secure HUD's approval for renovation of the Court Street building violated 24 C.F.R. §968.315. Although the Government introduced no evidence to show the impact of that violation, it must be deemed "material." The Secretary has defined "material" in the context of civil money penalty litigation as "In some significant respect or to some significant degree." 24 C.F.R. §30.10. A decision to spend $300,000 of public funds to expand administrative offices or $161,000 to renovate an administrative building is unquestionably "significant" and hence "material."

Because Respondent's violation of 24 C.F.R. §968.315 was material, it created cause for debarment within the meaning of 24 C.F.R. §24.305(f), which proscribes a "material violation . . . of a regulatory provision . . . applicable to . . . the performance of requirements under a grant . . . ."

Cause for debarring Respondent may also be found in 24 C.F.R. §24.305(d) for the same reason set out above in the discussion of Respondent's bad advice to Mr. Collier. Anyone with Respondent's years of experience working with public funds has ample reason to know that use of the funds is significantly circumscribed by the Government. A responsible director of operations of a housing authority would have investigated, or directed someone else to investigate, whether EHA was required to obtain HUD's permission before the housing authority could lawfully use CGP funds to renovate the Court Street building. The failure to investigate was irresponsible.

Because the record does not show that Respondent knew that EHA could not use CGP funds to renovate the Court Street building without HUD's prior approval, he cannot be found to have willfully violated 24 C.F.R. §968.315. Therefore, cause for debarring Respondent does not reside in 24 C.F.R. §24.305(b) based on Respondent's participation in EHA's failure to secure HUD approval before using CGP funds for that purpose.

In September 1997, on behalf of Mr. Collier, Respondent signed the report to HUD erroneously stating that EHA had used $161,238 of CGP funds to renovate the old

administration building. That act created cause for Respondent's debarment under 24 C.F.R. §§24.305 (d) and (f) but not subsection (b).

Respondent either signed the report knowing that it contained the error, or he signed it without reading it or knowing its contents. If he signed it without reading it or knowing what it said, he acted negligently and irresponsibly within the meaning of 24 C.F.R. §24.305(d).

Because the error was clearly "material" within the Secretary's definition of that term, the erroneous report to HUD must be deemed a material violation of 24 C.F.R. §968.320(c). Therefore, when Respondent signed the erroneous report to HUD, he created cause for debarment under 24 C.F.R. §24.305(f), because that act was a "material violation . . . of a regulatory provision . . . applicable to . . . the performance of requirements under a grant . . . ."

Finally, because the record contains no proof that Respondent signed the report knowing that it contained a material error, his signature on the report did not create cause for debarment under 24 C.F.R. §24.305(b).

Extenuation and Mitigation

Although Respondent has given cause for his debarment, the circumstances of this case show that debarment is not required to protect the public interest. HUD's regulations provide that

> [t]he existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the persons's acts or omissions and any mitigating factors shall be considered in making any debarment decision. [24 C.F.R. §24.300]

Respondent's misconduct in 1996 and 1997 was not so serious as to require debarment. He acted in good faith. His violative behavior brought him no benefit and was the result of carelessness and negligence rather than dishonesty or some other serious character flaw that would raise a strong inference of future misconduct. This is not to say that a respondent's past carelessness and negligence cannot justify debarment if the record demonstrates that future harm to the public interest can reasonably be expected. But Respondent's isolated instances of simple negligence do not demonstrate a man likely to cause significant injury.

In fact, the record does not prove that the mistakes that Respondent made

in 1996 and 1997 caused any harm at all. Using conclusory statements devoid of evidentiary support made by personnel in the Indiana field office, the Government argues that EHA's purchase of the Court Street building deprived low-income people of $750,000 that would otherwise have been available to serve their needs. However, other evidence with greater probative force contradicts the Government's argument. Mr. Collier persuaded the members of the EHA Board of Commissioners to approve purchase of the Court Street building by showing them that the transaction would make EHA's operations more efficient and save money—money that could be used to better serve low-income residents of Evansville. The money used to buy the Court Street building had lain dormant for more than a year because it had not been needed. At the same time that EHA bought the building, Respondent arranged for a line of credit from a local bank so that any money needed to fund a homeownership project in the future would be available at minimum cost. It was thought that whatever costs were incurred by using the line of credit would be more than offset by savings generated through centralization of EHA's operations. That the line of credit was not used after September 1997 does not prove that any low-income people in Evansville were deprived of a benefit by EHA's purchase of the Court Street building. After the building was purchased, the HOPE I program was closed out (apparently by HUD), and the housing authority implemented a different homeownership program through which 18 homes were sold to low-income people between 1997 and 2001. The Government has not identified a single person who was prevented from buying a home because EHA purchased the Court Street building, and I am not persuaded that an unspecified number of unidentified people were injured by the transaction. Years after HUD learned of EHA's purchase of the Court Street building, the Government contends that the transaction deprived low-income people of the opportunity to buy homes. The tardiness of that contention undermines its credibility.

In any case, inasmuch as Respondent did not cause EHA to buy the Court Street building with HOPE I funds, he cannot be charged with causing whatever harm allegedly resulted from that transaction. He gave his supervisor bad advice, but that advice was not relied upon and hence had no effect—good or bad—on anyone.

The Government does not argue and has submitted no evidence to support an argument that Respondent caused any harm when he participated in the decision to use CGP funds to renovate the Court Street building and signed the erroneous report to HUD. Nor does the Government argue that renovation of the Court Street building with CGP funds would not have been approved had the housing authority sought approval beforehand. In short, the Government has not

shown that EHA's renovation of the Court Street building with CGP funds and subsequent erroneous report regarding the renovation in fact injured the public interest.

Respondent cooperated fully with the Government's investigation of this case and, according to an auditor for the Office of Inspector General, he conceded that EHA should have acquired HUD's approval before using HOPE I funds to buy the Court Street building and before using CGP funds to renovate the building. (Declaration of James Olson, August 15, 2003) Despite Respondent's reported concession, the Government argues that because Respondent has refused to show remorse or accept responsibility for his conduct, he is not presently responsible. Whether a respondent is presently responsible is the ultimate issue in a debarment case. If the Government demonstrates that a respondent is not presently responsible as of the date of the decision, the respondent loses the case. Therefore, if the Government's argument on this issue were adopted into law, no respondent could ever deny the charges and defend himself without simultaneously demonstrating that he lacks present responsibility. According to the Government's logic, a respondent has only two choices: plead guilty, or defend himself and thereby prove guilt—a Catch-22. That logic has no merit.

Respondent gave Mr. Collier defective financial advice during the fall of 1996. He participated in discussions leading to use of CGP funds to renovate the Court Street building in December 1996 and January 1997. He signed an erroneous report to HUD in September 1997. In other words, the misconduct demonstrating a lack of responsibility occurred from six years, 10 months to nearly eight years ago. That conduct is too remote in time to have much probative force today. *See In the Matter of: Lynne Borrell and Lynne Borrell and Associates,* HUDBCA No. 91-5907-D52, 1991 HUD BCA LEXIS 22 (Sept. 20, 1991)(passage of time diminishes probative value of acts showing lack of present responsibility). To be sure, a respondent may be found to lack present responsibility based on past acts; but the staler the evidence, the weaker the proof. The evidence in this case is exceedingly stale.

Personnel in HUD's Indiana office knew that EHA had bought the building with HOPE I funds within days of the purchase, and Respondent repeatedly requested guidance from the Department during the months following the transaction; yet the Department took no action for six and a half years. If Respondent's misconduct in 1996 and 1997 was so egregious that his debarment is required in 2004, then the public interest unquestionably required his debarment years ago. The case for debarment at this late date is undermined by

the Government's failure to take corrective action for more than six and a half years despite having knowledge of Respondent's conduct. In fact, the history of events in this case suggests that HUD would not have done anything to sanction the transactions if the Office of Inspector General had not taken an interest in the operations of EHA some four years later.

There is no merit to the Government's argument to the effect that Respondent demonstrated a lack of responsibility throughout the period from January 1997 to September 1999. According to this argument, before leaving EHA's employ in September 1999, Respondent should have attempted to persuade Mr. Collier and EHA's Board of Commissioners that EHA should refinance the Court Street building and repay $750,000 into the HOPE I account. As noted above, HUD knew about the transaction in January 1997, and Respondent repeatedly asked the Government whether there were anything wrong with it. He received no guidance. Now the Government argues, more than seven years later, that Respondent should have decided on his own that the transaction was unlawful and "persuaded" his supervisor and the Board of Commissioners to refinance it—all in the face of the Government's apparent acquiescence. It is, to say the least, unseemly for the Government to fault Respondent for not taking on a role that the Government abdicated for years.

Furthermore, there is no evidence that Respondent has behaved irresponsibly since September 1997. On the contrary, his current supervisor, the Executive Director of the Rochester, New York, housing authority, has high praise for Respondent's character and competence based on his association with Respondent for more than four years:

> In my capacity as Executive Director for RHA, I have had occasion to form an opinion of Mr. Wasson's honesty, integrity, probity, capacities, and professional demeanor. I hold Mr. Wasson in high regard on all scores. I find him honest, sincere, diligent, knowledgeable, and responsible. In all performance reviews he has received during his tenure with RHA, Mr. Wasson has achieved high marks. I have had no reason to impose any manner of discipline on Mr. Wasson, nor have I observed anything to call Mr. Wasson's character into question. To the contrary, I view him as a highly valuable employee and an asset to RHA. [McHugh Declaration, September 10, 2003]

Debarring Respondent would cause grave, perhaps irreparable, damage to his career as a public servant. Such consequences could be justified if it were clear that his debarment is required to protect the public interest. But the facts of

this case do not show that Respondent's continued participation in Government business presents an unacceptable risk of injury to the public. To debar him under these circumstances could be justified only on punishment grounds, and the law explicitly prohibits debarment for punishment purposes. *See Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984); 24 C.F.R. §24.115(b).

That HUD brought this case and Respondent has been found to have created cause for his debarment should deter Respondent from future acts of actionable negligence and carelessness. In the unlikely event that Respondent creates cause for debarment in the future, he almost certainly will find the result far more unpleasant than the conclusions reached in this case.

CONCLUSIONS

Upon consideration of the entire record in this matter, I conclude that in 1996 and 1997 Respondent created cause for his debarment from future participation in procurement and nonprocurement transactions as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government.

However, the evidence of record fails to prove that Respondent's offenses were anything more than isolated instances of simple negligence that apparently caused no harm. His misconduct therefore cannot be deemed sufficiently serious to justify debarment. Furthermore, HUD's delay in bringing a case against Respondent undermined the cause for debarment to the point that he cannot now be found to lack "present responsibility" on the basis of events that occurred from six years, 10 months to nearly eight years ago. The evidence does not show that Respondent is not presently responsible. Under these circumstances, debarment could be justified only on punishment grounds, and the law explicitly prohibits debarment for punishment purposes.

The conclusions reached in this case moot Respondent's Motion to Strike of May 3, 2004. The motion is accordingly **ORDERED** denied.

THOMAS C. HEINZ

Administrative Law Judge

Dated: August 5, 2004

CERTIFICATE OF SERVICE

I hereby certify that copies of this **HEARING OFFICER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW** issued by THOMAS C. HEINZ, Administrative Law Judge, HUDALJ No.04-030-DB, were sent to the following parties on this 5th day of August 2004, in the manner indicated:

_____
Chief Docket Clerk

REGULAR MAIL:

Robert A. Graham, Esq.
Reno & Cavanaugh, PLLC
1250 Eye Street, N.W.
Suite 900
Washington, DC 20005

Mona Lyons, Esq.
Peter Butcher, Esq.
1666 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20009

INTEROFFICE MESSENGER

Brendon Power, Esq.
Government Counsel
Dane Narode, Assistant General Counsel
Mier Wolf, Debarring Official's Designee
Tammie M. Parshall, Docket Clerk
U.S. Department of Housing and
Urban Development
Departmental Enforcement Center
U.S. Department of Housing and Urban Development
451 Seventh Street, SW.
Room B-133, VALA
Washington, DC 20410